IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

(SOUTH EASTERN CAPE LOCAL DIVISION)

Case No.: 5362/05

Date delivered: 19 June 2008

In the matter between:

THEUNIS CROUS Plaintiff

and

KOUGA MUNICIPALITY Defendant

JUDGMENT

JANSEN, J:

This is an action for damages resulting from a letter written by one Phumzile Oliphant to the editor of a regional newspaper, "Our Times" which is distributed within the Jeffreys Bay, Humansdorp and St Francis Bay area. This letter was dated 21 July 2005. At the time the said Mr Oliphant was the Media Liaison Officer of the Kouga Municipality, on which letterhead the letter was written, with a further indication that it emanated from the office of the Mayor. This letter reads as follows:

> "TO: THE EDITOR
> OUR TIMES
>
> Sir/Madam
>
> After reading the unpopular story written by the unpopular Mr Theunis Crous, this Council see it necessary to respond and put to quivive, all matters regarding these empty allegations.

In fact the Council is not taking the utterances by Mr Crous too light and as such we challenge him to come forward with substance to support his empty snobbish accusations.

To those that know little of him and his style of operation you indeed need to ask a multitude of questions. This Council has known Mr Crous for many years. His modus operandi is that of entitlement he always demands from the Council as if he is only inhabitant of Kouga. I would like to sight typical and practical instances; inter alia;

- The alienation of land
- Management of refuse sites etc.

Because this Council did not award him the land he tendered for, he opted to take this Council to the High Court. It is time for this Council to put its views to the majority of Kouga population. Mr Crous is not and will never be a sole beneficiary of land and tenders of this Council.

He is a type of person whose fashion is to make allegations around corruption and mismanagement but, when this Council pleads with him for documented information, he never submits such.

We don't take this man serious. He is a "Bull in a Chinese Shop". He is always engaged in destructive and undermining programmes.

The public of Kouga elected these Councillors by so doing they entrusted these leaders to take charge of the day to day running of this Council. Mr Crous is fully aware that never in the history of a legislative body did public participate in appointing officials. This Council in whatever it does it applies the relevant Acts and Regulations, among these; it is required by law that Council advertise all vacancies. If Mr Crous is interested to apply for any of the Director positions, he has a right to do so.

Our Councillors were never marginalized by

capitalists. The only capitalist that has done so was Mr Crous by taking this Council to court for a piece of land that belongs not to him but to the people of Kouga.

The Council has an outstanding record of transparency and consultation in whatever it does. Therefore the process of appointing Directors will be open and transparent, the public will know every inch in that.

For the sake of the masses of Kouga we once again wish to challenge Mr Crous to come forward and prove to us on the allegation that there is already a move to appoint certain people in the Director posts.

For the sake of the masses of Kouga can Mr Crous come forward and furnish this Council with information and substance on fraud and corruption. It is time that we tell this man that enough is enough. He should stop his snobbish accusations against this Council. In fact as an unpopular discredited resident; he should not use this Council to build his image.

The constant and continuous referral to BEE by him is totally misleading. He is a direct beneficiary of apartheid and will never change from that. Mr Crous is a 100% white owned non-transformed business, which I doubt he intends to bring black people into his company.

We should not be misled by him. He is manifesting BEE for his selfish opportunist benefit. The public of Kouga should be aware of the fact that many opportunist has made use of what we achieved through blood and sweat. The sudden strong cadres like Mr Crous are those that use the policies to empower the historically disadvantage to their own benefit.

He was never a freedom fighter, Mr Crous jumped on the success of those that tirelessly fought for freedom and democracy. In fact he saw greener pastures where he can get instant fortune. This Council will never allow him to ride on the struggle and gains of the poor.

In regard to the settlement with the erstwhile Directors and the former Municipal Manager, this

Council want to ensure the public the decision we took was legally correct and by mutual agreement.

Yours faithfully

PHUMZILE OLIPHANT
MEDIA LIAISON OFFICER" (S*ic)*

The Executive Mayor of the Kouga Municipality Mr Robert Dennis was called to testify on behalf of the defendant. It was his evidence that Mr Oliphant did not act in the course and scope of his employment with the defendant nor was he authorised to publish the letter. According to Mr Dennis the majority councillors from the Kouga Municipality are members of the ANC. The plaintiff is also a member of the ANC. Mr Dennis testified that the letter to the editor was written in reaction to a report which appeared in the "Our Times" newspaper under a sub-heading "ANC lashes out at "*fortune hunters*" lining up for Kouga vacancies after decision to "*buy out*" five officials". The full page which contained the report was not placed before me with the result that the main heading is not depicted. What is depicted is "dy dinosaurs". From the contents of the report an inference can be drawn that the heading refers to "greedy dinosaurs". The report written by one John Viljoen reads as follows:

> "COUNCILLORS occupying strategic positions have found themselves surrounded by greedy capitalist dinosaurs with destructive agenda", said Theunis Crous of the ANC central branch this week in a scathing attack on the Kouga council following the latter's decision to "buy out" five formerly suspended officials.
>
> Crous accused the councillors of creating the costly situation in which they find themselves.
>
> "These capitalist dinosaurs marginalise our councillors in a manner that portrays them as dismal failures who cannot carry the mandate of their own organisation," he said.

He said the line-up of aspirant directors to fill the vacant positions in Kouga came as no surprise.

"The hopefuls include municipal and district councillors who know they are not going back as councillors after the next election."

Among them are fired municipal officials from other towns.

"Surprisingly, these 'fortune hunters' seem to know and understand the movement more than its active cadres," he said.

"This is evidence when they pursue their own interest for the attainment of director positions in our municipality, disregarding the huge responsibility attached to such positions.

"If we let this practice continue unabated in this second decade of our freedom, do we do justice to the movement that carries the mandate of the majority of people in the Kouga?"

Crous said they wanted to call on every member of the movement to regard themselves as deployed in the municipality's departments to monitor the process of employing new directors in the Kouga.

He said fraud and corruption was the number one enemy of the "national democratic revolution" as it consumed the limited resources the municipality had in reserve.

"The opposition does not constructively criticise the ANC. It employs dirty tricks and continuously tries to destroy every attempt they make towards addressing the problems of the people of the Kouga.

"The people of the Kouga will decide who the new directors will be -- not a few councillors.

"Never again must the Kouga be in this sad position it finds itself in," Crous said."

A reading of the report allows for an inference to be drawn that the Theunis Crous, referred to in the report, which is accepted to be the plaintiff, was verbally quoted by the reporter.

It is common cause that the letter written by Mr Oliphant was not published in the newspaper. It was apparently only brought to the attention of a reporter and to the attention of the editor. A copy of the letter was made available to an attorney, probably the newspaper's attorney, who on his turn gave a copy thereof to the plaintiff's attorney of record.

A bundle of documents was placed before me on behalf of the defendant. Those documents contained the report of a disciplinary hearing which Mr Dennis testified about. That disciplinary hearing was instituted to discuss the letter written by Mr Oliphant. Mr Dennis confirmed that his evidence at the disciplinary hearing was recorded on page 9 of the report which appears on page 40 of the bundle. It was confirmed by Mr Dennis that he was very upset after he had seen the report in "Our Times" and that he instructed the employee, which was Mr Oliphant, to draft a response letter to the editor of the newspaper. The draft was then discussed in Mr Dennis' office in the presence of other councillors, but Mr Dennis then left to attend to other businesses. The next day he saw that the letter was changed and he called in Mr Oliphant to ask him why it was done whereupon Mr Oliphant replied that a certain councillor Stuurman had made the changes.

The first issue to be decided is whether or not the defendant can be held vicariously liable for the letter written by Mr Oliphant. At the relevant time Mr Oliphant was the defendant's media liaison officer. His general function was

to liaise *inter alia* with the press. The letter written by Mr Oliphant to the editor of “Our Times” was in response to the report published by “Our Times” which was authored by the plaintiff. It was never the defendant’s case that Mr Oliphant could not perform the function of communicating with the press, but it states that on this particular occasion he exceeded his authority by sending a letter which was not approved by the mayor. There can be no doubt at all that in the present instance there was an employer/employee relationship between Mr Oliphant and the defendant. The issue of writing a letter to “Our Times” in response to the report published was discussed at the meeting of the council attended by the Mayor as well as other councillors including councillor Stuurman. There can be no doubt at all that Mr Oliphant acted within the course and scope of his employment with the defendant. In ***Minister of Safety and Security v Jordaan t/a André JordaanTransport*** 2000 (4) SA 21 (SCA) at 24H-25E Scott JA said the following:

> "The standard test for vicarious liability is, of course, whether the delict in question was committed by an employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the time the employee was about the affairs or business of doing the work of the employer (see, for example *Minister of Law and Order v Ngobo* 1992 (4) SA 822 () at 827B; *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 132G). This is no doubt true, but it should not be overlooked that the affairs or business or work of the employer in question must relate to what the employee was generally employed or specifically instructed to do. Provided the employee was engaged in activity reasonable necessary to achieve either objective, the employer will be liable (see E*state Van der Byl v Swanepoel* 1927 AD 141 at 145-6. 151-2). The difficulty, of course, is that while the general approach to be adopted may be easy enough to formulate, its lack of exactitude is such that problems inevitably arise in its application. This is particularly so in the so-called 'deviation' cases. What is clear is that not every act of an employee committed during the time of his employment which is in the advancement of his personal interest or for the achievement of his own goals necessarily falls outside the course and scope of his employment (*Viljoen v Smith* 1997 (1) SA 309 (A) at 315F- G.) In each case, whether the employer is to be held liable or not must depend on the nature and extent of the deviation. Once the deviation is such that it cannot be reasonably held that the employee is still exercising the functions to which he was appointed, or still carrying out some instruction of his employer, the latter will cease to be liable. Whether that stage has been reached is essentially a question of degree. (See *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 756-7; *United Government v Hawkins* 1944 AD 556 at 563; *Viljoen v Smith (supra* at 316E-317A).) The answer in each case will depend upon a close consideration of the facts. The same is true of the inquiry as to whether the deviation has ceased and the employee has resumed the business of his employer."

Mr **Pretorius** on behalf of the defendant during argument refrained from making any submissions in support of the defendant's plea that Mr Oliphant did not act in the course and scope of his employment with the defendant. The evidence overwhelmingly justifies an inference that he did. This is also not a "deviation" case.

Mr **Pretorius** based his whole argument on the defendant's plea that the contents of the letter is not defamatory. It was argued that if regard is had to the contents of the report and the contents of the letter that an internal political fight between councillors and members of the ANC was surfaced. Under those circumstances so it was argued a different meaning should be given to words and phrases used to such an extent that it should not be regarded as defamatory. In support of his argument Mr **Pretorius** relied on the decision of Grosskopff JA in ***Argus Printing and Publishing Company Ltd v Inkata Freedom Party*** 1992 (3) SA 579 (AD) and in particular to statements made by the learned Judge of Appeal that political debate should be unfettered and that people should not be restrained in their political utterances by the fear of being subjected to claims of defamation. It was pointed out that the traditional standard for determining whether utterances are defamatory is whether the imputation conveyed by them lowers the plaintiff in the estimation of right thinking persons generally. Mere debate on political questions or expressions of disagreement with an opponents political views would clearly not be actionable. Even personal criticisms of a political opponent are not readily regarded as defamatory. The learned Judge refers to the general approach properly adopted by our Courts that a wide latitude should be allowed in public debate on political matters. It was, however, never stated that utterances during political debate can never be regarded as defamatory. In such a case certain defences would be available for a defendant. Although such a defence was raised in the defendant's plea namely that the letter "was

written on privilege occasion i.e. that it is the truth and in the public interest" (*sic),* that defence was never persisted with. It was not even raised during the trial.

Objectively viewed, what was said of the plaintiff was defamatory. He was described as an opportunist of doubtful character. He deliberately and falsely accuses persons in authority. He should not be taken seriously and is engaged in undermining destructive activities. He indiscriminately seeks to build up his wealth even to the extent of claiming land to which he has no entitlement. It was said that the plaintiff has no standing within the community and is regarded as an unpopular and discredited resident. It is said that the plaintiff is devious and in an underhand manner attempts to financially better himself by pretending to endorse black economic empowerment whilst in fact he does not do so and never intends to do so. It was also suggested that the plaintiff dishonestly tries to mislead others. On a proper analysis of the letter by Mr Oliphant the publication thereof, even though only to a reporter and the editor of the newspaper, was wrongful and defamatory.

In his Particulars of Claim the plaintiff claimed damages in an amount of R500 000. Mr **Beyleveld** on behalf of the plaintiff submitted that damages in an amount of R25 000 would be an appropriate award. In considering the quantum of damages I have to take into account that the plaintiff was the person who initially took the whole issue to the press. Strong words were also

used by the plaintiff which words were printed *verbatim*. To a certain extent the plaintiff was the author of his own misfortune. In addition thereto the publication was, as said before, very limited. Mr **Pretorius** on behalf of the defendant referred me to the decision of ***Van der Berg v Coopers and Lybrand Trust (Pty) Ltd and Others*** 2001 (2) SA 242 (SCA) on the question of quantum of damages. In that case an award of R30 000 was made in favour of the plaintiff who was a senior advocate. Publication in that matter was more widely and the defamatory statement formed part of a permanent public record. I take into account that comparison with other matters serves a very limited purpose. No two cases are alike. The award in one case cannot be used as an accurate yardstick in another. But the defamatory remarks in the instant case are less serious, more limited publicised and made about a person, the plaintiff, of which I know nothing more than him being a member of the African National Congress. In my view, an award of R8 000 would be appropriate.

That leaves the question of costs. It was suggested on behalf of the plaintiff that costs on a High Court scale should be awarded to the plaintiff. I do not agree. The plaintiff could and should have approached the Magistrates' Court for his relief.

In the result, the plaintiff is awarded damages in an amount of R8 000 with costs on the Magistrates' Court scale.

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J C H JANSEN

JUDGE OF THE HIGH COURT